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6 Attorneys for Defendants
CLUCK UNIVERSITY CHICKEN OF PALO ALTO, LP, d/b/a
7 UNIVERSITY CHICKEN SANTA CLARA, LP; UC RESTAURANT
MANAGEMENT, INC.; UNIVERSITY CHICKEN, INC.; UNIVERSITY
8 CHICKEN FRESNO, LP; UNIVERSITY CHICKEN SAN JOSE, LLC; and
9 MICHAEL C. BORNEO

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13 CLUCK-U, CORP.,
a Maryland corporation,

14 Plaintiff,

15 v.

16 CLUCK UNIVERSITY CHICKEN OF PALO
17 ALTO, LP, d/b/a UNIVERSITY CHICKEN
SANTA CLARA, a California limited
18 partnership; CLUCK UNIVERSITY CHICKEN
OF SAN JOSE, LP, a California limited
19 partnership; UC RESTAURANT
MANAGEMENT, INC., a California
20 corporation; UNIVERSITY CHICKEN, INC., a
California corporation; UNIVERSITY
21 CHICKEN FRESNO, LP, a California limited
partnership; UNIVERSITY CHICKEN SAN
22 JOSE, LLC, a California limited liability
company; Michael C. Borneo, an individual; and
23 DOES 1-50, inclusive,

24 Defendants.
25

CASE NO. C07-04986 EMC

ANSWER TO COMPLAINT

26 Defendants CLUCK UNIVERSITY CHICKEN OF PALO ALTO, LP, d/b/a UNIVERSITY
27 CHICKEN SANTA CLARA, LP; UC RESTAURANT MANAGEMENT, INC.; UNIVERSITY
28

1 CHICKEN, INC.; UNIVERSITY CHICKEN FRESNO, LP; UNIVERSITY CHICKEN SAN
2 JOSE, LLC; and MICHAEL C. BORNEO submit the following answer to plaintiff's complaint.

3 1. Answering the allegations of Paragraph 1, these answering defendants admit said
4 allegations.

5 2. Answering the allegations of Paragraph 2, these answering defendants admit this Court
6 has the discretion to exercise supplemental jurisdiction over the state law claims alleged in
7 plaintiff's complaint. These answering defendants lack sufficient information to admit or deny
8 the remaining allegations therein and therefore deny said allegations on information and belief.

9 3. Answering the allegations of Paragraph 3, these answering defendants admit that venue
10 in this judicial district is proper. These answering defendants deny the remaining allegations
11 therein.

12 4. Answering the allegations of Paragraph 4, these answering defendants admit said
13 allegations.

14 5. Answering the allegations of Paragraph 5, these answering defendants admit that Cluck
15 University Chicken of Palo Alto, L.P. d/b/a University Chicken Santa Clara is a California
16 limited partnership. These answering defendants deny the remaining allegations of said
17 paragraph.

18 6. Answering the allegations of Paragraph 6, these answering defendants deny said
19 allegations.

20 7. Answering the allegations of Paragraph 7, these answering defendants admit said
21 allegations.

22 8. Answering the allegations of Paragraph 8, these answering defendants admit that
23 University Chicken San Jose, LLC is a California limited liability company. These answering
24 defendants deny the remaining allegations of said paragraph.

25 9. Answering the allegations of Paragraph 9 these answering defendants admit said
26 allegations.

27 10. Answering the allegations of Paragraph 10, these answering defendants admit said
28 allegations.

- 1 11. Answering the allegations of Paragraph 11, these answering defendants admit said
2 allegations.
- 3 12. Answering the allegations of Paragraph 12, these answering defendants lack sufficient
4 information to admit or deny said allegations therein and therefore deny said allegations on
5 information and belief.
- 6 13. Answering the allegations of Paragraph 13, these answering defendants deny said
7 allegations.
- 8 14. Answering the allegations of Paragraph 14, these answering defendants admit deny the
9 allegations of said paragraph.
- 10 15. Answering the allegations of Paragraph 15, these answering defendants deny said
11 allegations.
- 12 16. Answering the allegations of Paragraph 16, these answering defendants admit plaintiff
13 has used in commerce the mark "CLUCK-U-CHICKEN." These answering defendants lack
14 sufficient information to admit or deny the remaining allegations therein and therefore deny said
15 allegations on information and belief.
- 16 17. Answering the allegations of Paragraph 17, these answering defendants admit plaintiff
17 has submitted a trademark application to the United States Patent and Trademark Office
18 ("hereinafter USPTO") for the mark "CLUCK-U-CHICKEN," serial number 77/285,875.
19 These answering defendants deny that plaintiff has obtained USPTO registration of said mark.
20 These answering defendants lack sufficient information to admit or deny the remaining
21 allegations therein and therefore deny said allegations on information and belief.
- 22 18. Answering the allegations of Paragraph 18, these answering defendants admit plaintiff
23 has obtained USPTO registration of "UNIVERSITY CHICKEN," registration no. 3137573.
24 These answering defendants lack sufficient information to admit or deny the remaining
25 allegations therein and therefore deny said allegations on information and belief.
- 26 19. Answering the allegations of Paragraph 19, these answering defendants lack sufficient
27 information to admit or deny said allegations and therefore deny said allegations on information
28 and belief.

1 20. Answering the allegations of Paragraph 20, these answering defendants deny that
2 plaintiff's marks are strong marks, inherently arbitrary, fanciful, distinctive or suggestive.
3 These answering defendants lack sufficient information to admit or deny the remaining
4 allegations therein and therefore deny said allegations on information and belief.

5 21. Answering the allegations of Paragraph 21, these answering defendants lack sufficient
6 information to admit or deny the remaining allegations therein and therefore deny said
7 allegations on information and belief.

8 22. Answering the allegations of Paragraph 22, these answering defendants deny said
9 allegations.

10 23. Answering the allegations of Paragraph 23, these answering defendants deny said
11 allegations.

12 24. Answering the allegations of Paragraph 24, these answering defendants deny said
13 allegations.

14 25. Answering the allegations of Paragraph 25, these answering defendants re-allege and
15 incorporate by reference their responses to the allegations in paragraphs 1 through the
16 immediately preceding paragraph as though fully set forth.

17 26. Answering the allegations of Paragraph 26, these answering defendants deny said
18 allegations.

19 27. Answering the allegations of Paragraph 27, these answering defendants deny said
20 allegations.

21 28. Answering the allegations of Paragraph 28, these answering defendants deny said
22 allegations.

23 29. Answering the allegations of Paragraph 29, these answering defendants deny said
24 allegations.

25 30. Answering the allegations of Paragraph 30, these answering defendants re-allege and
26 incorporate by reference their responses to the allegations in paragraphs 1 through the
27 immediately preceding paragraph as though fully set forth.

28 31. Answering the allegations of Paragraph 31, these answering defendants deny said

1 allegations.

2 32. Answering the allegations of Paragraph 32, these answering defendants deny said
3 allegations.

4 33. Answering the allegations of Paragraph 33, these answering defendants deny said
5 allegations.

6 34. Answering the allegations of Paragraph 34, these answering defendants re-allege and
7 incorporate by reference their responses to the allegations in paragraphs 1 through the
8 immediately preceding paragraph as though fully set forth.

9 35. Answering the allegations of Paragraph 35, these answering defendants deny said
10 allegations.

11 36. Answering the allegations of Paragraph 36, these answering defendants deny said
12 allegations.

13 37. Answering the allegations of Paragraph 37, these answering defendants lack sufficient
14 information to admit or deny said allegations and therefore deny said allegations on information
15 and belief.

16 38. Answering the allegations of Paragraph 38, these answering defendants deny said
17 allegations.

18 39. Answering the allegations of Paragraph 39, these answering defendants re-allege and
19 incorporate by reference their responses to the allegations in paragraphs 1 through the
20 immediately preceding paragraph as though fully set forth.

21 40. Answering the allegations of Paragraph 40, these answering defendants lack sufficient
22 information to admit or deny said allegations and therefore deny said allegations on information
23 and belief.

24 41. Answering the allegations of Paragraph 41, these answering defendants deny said
25 allegations.

26 42. Answering the allegations of Paragraph 42, these answering defendants deny said
27 allegations.

28 43. Answering the allegations of Paragraph 43, these answering defendants deny said

1 allegations.

2 44. Answering the allegations of Paragraph 44, these answering defendants deny said
3 allegations.

4 45. Answering the allegations of Paragraph 45, these answering defendants re-allege and
5 incorporate by reference their responses to the allegations in paragraphs 1 through the
6 immediately preceding paragraph as though fully set forth.

7 46. Answering the allegations of Paragraph 46, these answering defendants deny said
8 allegations.

9 47. Answering the allegations of Paragraph 47, these answering defendants deny said
10 allegations.

11 48. Answering the allegations of Paragraph 48, these answering defendants deny said
12 allegations.

13 49. Answering the allegations of Paragraph 49, these answering defendants re-allege and
14 incorporate by reference their responses to the allegations in paragraphs 1 through the
15 immediately preceding paragraph as though fully set forth.

16 50. Answering the allegations of Paragraph 50, these answering defendants deny said
17 allegations.

18 51. Answering the allegations of Paragraph 51, these answering defendants deny said
19 allegations.

20 52. Answering the allegations of Paragraph 52, these answering defendants re-allege and
21 incorporate by reference their responses to the allegations in paragraphs 1 through the
22 immediately preceding paragraph as though fully set forth.

23 53. Answering the allegations of Paragraph 53, these answering defendants deny said
24 allegations.

25 54. Answering the allegations of Paragraph 54, these answering defendants deny said
26 allegations.

27 55. Answering the allegations of Paragraph 55, these answering defendants deny said
28 allegations.

1 56. Answering the allegations of Paragraph 56, these answering defendants deny said
2 allegations.

3 57. Answering the allegations of Paragraph 57, these answering defendants deny said
4 allegations.

5 58. Answering the allegations of Paragraph 58, these answering defendants deny said
6 allegations.

7 59. Answering the allegations of Paragraph 59, these answering defendants deny said
8 allegations.

9 60. Answering the allegations of Paragraph 60, these answering defendants lack sufficient
10 information to admit or deny said allegations and therefore deny said allegations on information
11 and belief.

12 61. Answering the allegations of Paragraph 61, these answering defendants deny said
13 allegations.

14 62. Answering the allegations of Paragraph 62, these answering defendants deny said
15 allegations.

16 63. Answering the allegations of Paragraph 63, these answering defendants re-allege and
17 incorporate by reference their responses to the allegations in paragraphs 1 through the
18 immediately preceding paragraph as though fully set forth.

19 64. Answering the allegations of Paragraph 64, these answering defendants deny said
20 allegations.

21 65. Answering the allegations of Paragraph 65, these answering defendants deny said
22 allegations.

23 66. Answering the allegations of Paragraph 66, these answering defendants re-allege and
24 incorporate by reference their responses to the allegations in paragraphs 1 through the
25 immediately preceding paragraph as though fully set forth.

26 67. Answering the allegations of Paragraph 67, these answering defendants deny said
27 allegations.

28 68. Answering the allegations of Paragraph 68, these answering defendants deny said

1 allegations.

2 69. Answering the allegations of Paragraph 69, these answering defendants deny said
3 allegations.

4 70. Answering the allegations of Paragraph 70, these answering defendants deny said
5 allegations.

6 71. Answering the allegations of Paragraph 71, these answering defendants deny said
7 allegations.

8 72. Answering the allegations of Paragraph 72, these answering defendants deny said
9 allegations.

10 73. Answering the allegations of Paragraph 73, these answering defendants re-allege and
11 incorporate by reference their responses to the allegations in paragraphs 1 through the
12 immediately preceding paragraph as though fully set forth.

13 74. Answering the allegations of Paragraph 74, these answering defendants deny said
14 allegations.

15 75. Answering the allegations of Paragraph 75, these answering defendants deny said
16 allegations.

17 76. Answering the allegations of Paragraph 76, these answering defendants deny said
18 allegations.

19 77. Answering the allegations of Paragraph 77, these answering defendants deny said
20 allegations.

21 78. Answering the allegations of Paragraph 78, these answering defendants deny said
22 allegations.

23 **AFFIRMATIVE DEFENSES**

24 AS A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE
25 HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, these
26 answering defendants allege that said Complaint fails to state facts sufficient to constitute a cause of
27 action against these answering defendants.

28 AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON

1 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
2 these answering defendants allege that plaintiff delayed asserting the claims alleged in the
3 Complaint, defendants were prejudiced by said delay and as such plaintiff's claims are barred by the
4 doctrine of laches.

5 AS A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
6 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
7 these answering defendants allege that the claims asserted in the Complaint are barred by the
8 doctrine of unclean hands.

9 AS A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
10 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
11 these answering defendants allege that plaintiff is estopped from asserting the claims alleged in the
12 Complaint.

13 AS A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE
14 HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN, these
15 answering defendants allege that plaintiff has waived the claims alleged in the Complaint.

16 AS A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
17 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
18 these answering defendants allege that at all times and places mentioned in the Complaint herein,
19 plaintiff failed to mitigate the amount of its damages.

20 AS A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
21 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
22 these answering defendants allege that the alleged causes of action set forth in the Complaint are,
23 and each of them is, barred by the statute of limitations.

24 AS A EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
25 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
26 these answering defendants allege that plaintiff has consented and acquiesced to the matters alleged
27 in the Complaint.

28 AS A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON

1 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
2 these answering defendants allege that their use of the marks alleged in the Complaint constitutes
3 non-infringing fair use of such marks.

4 AS A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
5 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
6 these answering defendants allege they are good faith senior users of the marks alleged in the
7 Complaint in a geographic area remote to plaintiff's alleged use of its alleged marks.

8 AS A ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT
9 ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
10 these answering defendants allege plaintiff improperly obtained the United States Patent and
11 Trademark Office trademark registration alleged in the Complaint through fraud and other improper
12 means, and said registration is invalid.

13 AS A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON
14 FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
15 these answering defendants allege that plaintiff's alleged marks are not inherently distinctive and
16 have not acquired secondary meaning, thus barring the claims in plaintiff's Complaint.

17 AS A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT
18 ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
19 these answering defendants allege plaintiff has failed to obtain copyright registration with the
20 United States Library of Congress, thus barring the claims in plaintiff's Complaint.

21 AS AN FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE
22 COMPLAINT ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION
23 CONTAINED THEREIN, these answering defendants allege that plaintiffs' Complaint, to the
24 extent that it seeks exemplary or punitive damages pursuant to §3294 of the Civil Code, violates
25 defendants' right to procedural due process under the Fourteenth Amendment of the United States
26 Constitution, and the Constitution of the State of California, and therefore fails to state a cause of
27 action upon which either punitive or exemplary damages can be awarded.

28 AS AN FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE COMPLAINT

1 ON FILE HEREIN, AND TO EACH ALLEGED CAUSE OF ACTION CONTAINED THEREIN,
2 these answering defendants allege that plaintiffs' Complaint, to the extent that it seeks punitive or
3 exemplary damages pursuant to §3294 of the Civil Code, violates defendants' rights to protection
4 from "excessive fines" as provided in the Eighth Amendment of the United States Constitution and
5 Article I, Section 17, of the Constitution of the State of California, and violates defendants' rights to
6 substantive due process as provided in the Fifth and Fourteenth Amendments of the United States
7 Constitution and the Constitution of the State of California, and therefore fails to state a cause of
8 action supporting the punitive or exemplary damages claimed.

9 WHEREFORE, these answering defendants pray for judgment as follows:

- 10 1. That plaintiff take nothing by the Complaint;
- 11 2. For costs of suit incurred herein; and
- 12 3. For such other and further relief as the Court deems proper.

13
14 Dated: December 5, 2007

HAYES DAVIS BONINO ELLINGSON
McLAY & SCOTT, LLP

15
16
17 By 

18 STEPHEN P. ELLINGSON
19 JAMIE A. RADACK
20 Attorneys for Defendants
21 CLUCK UNIVERSITY CHICKEN OF PALO
22 ALTO, LP, d/b/a UNIVERSITY CHICKEN
23 SANTA CLARA, LP; UC RESTAURANT
24 MANAGEMENT, INC.; UNIVERSITY
25 CHICKEN, INC.; UNIVERSITY CHICKEN
26 FRESNO, LP; UNIVERSITY CHICKEN SAN
27 JOSE, LLC; and MICHAEL C. BORNEO
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